No. 15928

United States
Court of Appeals
For the Ninth Circuit

JAMES D. BOBBROFF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Nevada

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif. — 4-4-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

CHARLES W. TESSMER, ESQ.,
1002 Fidelity Building,
1000 Main Street,
Dallas, Texas,

For Appellant.

FRANKLIN RITTENHOUSE,
United States Attorney,
Post Office Building,
Las Vegas, Nevada;

HOWARD W. BABCOCK,
Assistant United States Attorney,
Post Office Building,
Las Vegas, Nevada,

For Appellee.

In the District Court of the United States
for the District of Nevada

No. 1358

UNITED STATES OF AMERICA,

vs.

JAMES D. BOBBROFF.

MOTION TO VACATE SENTENCE

Now comes your petitioner in the above-styled and numbered cause and would show the Honorable Court the following:

I.

Your petitioner is a prisoner in custody under the sentence of the Court established by act of Congress and that he hereby claims the right to be released upon the grounds that the sentence was imposed in violation of the Constitution and laws of the United States and would further show the Honorable Court that said sentence is subject to collateral attack in that there was no effective cumulation of the sentences imposed upon the four counts of the indictment and that said attempt to cumulate one count of the indictment is vague and indefinite.

II.

Your petitioner would further show the Honorable Court that he has at this time served completely all sentences against him, save and except the sentence imposed on Count 3 of the indictment in the above-styled and numbered cause. That is to say,

your petitioner has served sufficient time to complete the sentences on Counts 5, 4 and 8 of the indictment.

III.

Your petitioner would further show the Honorable Court that said sentence and judgment is totally defective in attempting to cumulate the punishment against your petitioner for the following reasons:

(a) The order of sequence of serving the sentences is not provided for.

(b) The sentences imposed on two of the concurrent counts are for different period of times, that is to say, five years and three years to be served concurrently and there is no provision that the sentence imposed on Count 3 is to cumulate with Count 5 or with the other counts which were for three years instead of five [2*] years, thereby rendering the said sentence uncertain.

(c) There is no provision when the commencement of the sentence on Count 3 is to begin, that is to say, when the five-year sentence terminates or when the three-year sentence would terminate and for that reason the cumulation is ineffective.

(d) The judgment expressly provides that Count 3 will run consecutive with Count 5 while the sentence contains no such provision.

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Attached hereto and made a part of this motion for vacation of sentence as petitioner's Exhibit No. 1, is a properly certified copy of the official minutes of the above Court in the above-styled and numbered cause and the exact sentence as rendered in open Court. Petitioner makes this a part of this motion by reference as fully as if said Exhibit were set out herein.

IV.

Petitioner further attaches and makes a part of this motion, a statement of time served from the Federal Correctional Institution at Seagoville, Texas, Exhibit No. 2.

V.

Petitioner further attaches as a part of this motion, a certified copy of the judgment as entered in the above-numbered and styled cause and makes same a part of this motion as fully as if set out herein and would show the Court that the ministerial act of entering judgment does not follow the Judicial act of imposing sentence, Exhibit No. 3.

Wherefore, Premises Considered, your petitioner respectfully moves the Honorable Court to order this motion filed and to cause notice thereof to be served upon the United States Attorney for the above District and further, that the Honorable Court set a hearing hereon and upon a hearing of this motion that the Court make findings of fact and conclusions of law in [3] accordance with the question raised in this motion. Your petitioner further prays that the Honorable Court set aside

the sentence imposed upon Count 3 of the indictment in the above-numbered and styled cause for the reason that it is not authorized by law and is in violation of the constitutional rights of your petitioner. Your petitioner further prays that upon setting aside the said sentence that the Court order your petitioner's discharge from the Federal Correctional Institution at Seagoville, Texas, as petitioner has satisfied all other sentences.

/s/ JAMES D. BOBBROFF,
Pro Se, Petitioner.

Subscribed and sworn to before me, the undersigned authority on this the 13th day of December, A.D. 1957.

C. T. SKINNER,
Parole Officer.

Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 1004).

/s/ CHARLES W. TESSMER,
Attorney for Petitioner.

I hereby certify that a copy of this motion without Exhibits Nos. 1, 2 and 3 has been served on U. S. Attorney, District of Nevada, by mailing a copy, postage prepaid, to his office in Reno, Nevada.

/s/ CHARLES W. TESSMER.

[Endorsed]: Filed December 30, 1957. [4]

EXHIBIT No. 1

In the District Court of the United States
for the District of Nevada

No. 12,153

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES D. BOBBROFF and WILLIAM C. CHADWELL,
Defendants.

Before: Honorable Roger T. Foley, Judge.

SENTENCE

Be It Remembered, that the above-entitled matter came on regularly for hearing before the Court at Carson City, Nevada, on Friday, the 5th of October, 1951, the plaintiff being represented by Mr. Miles N. Pike and the defendant Bobbroff being present in court with his attorney, Mr. Skinner. The following proceedings were had:

Mr. Pike: In the case of United States against James D. Bobbroff, I would like to have the record show the presence in court of the defendant Bobbroff and also the presence in court of Mr. Louis D. Skinner, one of the attorneys for Mr. Bobbroff. It is my understanding that the Court fixed this time for further proceedings to be had in the case.

The Court: The defendant may stand up. The case of the [5] United States vs. James D. Bobbroff, No. 12,153, let the record show the presence of the defendant with counsel, Mr. Skinner. Mr. Bobbroff, on the 28th day of September, 1951, a jury, duly empanelled in this court, returned a verdict in the case of the United States of America vs. James D. Bobbroff, No. 12,153, finding that you are guilty as charged as to the third count contained in the indictment and guilty as charged of the charge contained in the fourth count of the indictment and guilty as charged of the charge contained in the 5th count of the indictment and guilty of the charge contained in the 8th count of the indictment. By virtue of the verdict of the jury, you are hereby adjudged guilty of the charge contained in the 3rd count of the indictment and also by virtue of the verdict of the jury, you are hereby adjudged guilty of the charge contained in the 4th count of the indictment and adjudged guilty of the charge contained in the 5th count of the indictment and adjudged guilty of the charge contained in the 8th count of the indictment. Now have you anything to say, Mr. Bobbroff, why the judgment of the Court should not be pronounced against you according to law? A. Not guilty.

The Court: Wait a moment until we hear what the United States attorney and the probation officer have to say, then I will be glad to hear from you or your counsel.

Mr. Pike: Your Honor presided at the trial and of course heard the evidence in respect to the

contention of the parties. [6] I do not feel there is anything the United States attorney's office has in the way of information that the probation officer has not had made available to him. For that reason I believe the probation officer's report covers such additional matters outside the evidence in the case which would be of assistance to the Court.

Mr. Devine: Your Honor, the files in this case are of considerable bulk. Since the case was tried before the Court, the Court is in better position to judge as to the actual facts than anyone else. Your Honor, the defendant is 58 years of age, to his best recollection, you might say. He states he was born on the 4th of July, in probably 1894, in what he calls Pinsk, Russia. He claims the equal and equivalent of a college education in this country. He states he was educated by the use of private tutors in Russia, came to the United States when about 16 years of age, supposedly to finish his education. He says that he did receive some schooling in the United States, apparently by attendance at night school. The defendant became a citizen of the United States by virtue of service in the armed forces, honorably discharged from the United States army. He served two different enlistments with the army. At first he claimed to have served under Gen. Pershing in the Mexican campaign and then to have served his second enlistment, or greater portion thereof, in the [7] army principal headquarters and his last service with the army was in France. While in the army in France he was riding a train and there was

an accident and he received injuries. These injuries were of a very severe nature, which drove a spike thru his back which resulted in evidently some mental deterioration, also caused the removal of one of his testicles and caused severe pain for the remainder of his life in his side. The defendant now, so far as can be determined, is not able to read with very great ease. Whether it is actually a mental cause or not, at least he supposedly blacks out if he reads fine print and can only write his own name and that with considerable difficulty. After being discharged from the army he travelled eventually into the area of Portland, Oregon. He had married while stationed with the army in that vicinity. This first marriage ended in divorce in a few years. No children the result of that marriage. The defendant returned to Portland and from that time to the present he has spent all of his time on what is known now as the Eversharp lawnmower. The defendant claims to be the inventor or the co-inventor, of this lawnmower. I honestly don't know, after spending many hours discussing the matter with the defendant, going through the results of investigation compiled by the Exchange investigator, just what the true situation is, your Honor. The defendant claims that he received roughly 43 thousand dollars from the sale of personal real estate in the vicinity of Portland and disability pensions and claims, etc., [8] paid to him by the United States government, and he claims to have invested approximately 43 thousand dollars of his own money in attempting to place the lawnmower, which

was the subject matter of this case, on the market. During these early days, 15 years or more, the defendant has raised money, so far as I can determine, most of it was spent in attempting to place the lawnmower on the market and outside of his personal expenses, of course, which he had to use some of the money to live on, during this period of time, it was a process of borrowing money. Eventually a corporation was formed which, as far as I can see, on the patents of this lawnmower and Bobbroff sold some stock and issued stock certificates as security for the money borrowed and then finally fairly recently, after this corporation was in such a position that the defendant spent by the government about 150 thousand dollars in the first corporation, the defendant indicates there was not very much money spent, maybe 60 thousand something like that. He alleges that was all spent honestly in atempting to place this lawnmower on the market. Then the defendant was referred to Reno, Nevada. Later the second corporation was organized. This corporation received from the original corporation which held the patents, the right to the manufacture or have manufactured and sell lawnmowers. Mr. Bobbroff came to Reno and there was considerable front put up, including this suit at the Mapes Hotel. As I understand the case, this case [9] hinges on the fact that misrepresentations were made as to what the situation, so far as the manufacture of lawnmowers is concerned, is. The record indicates, your Honor, that Bobbroff has made some payments back to

those people, how much I do not know. The defendant, of course, does not consider himself a criminal. He talks to me—is a very convincing talker, too—he talks like his whole life is wrapped up in the invention. He treats this invention like it was a child. In fairness to the defendant—it impresses me, of course I only talked six or seven times with the defendant—how was a man that was dealing with a lot of other people who were probably of equal or maybe superior intelligence to this defendant. An attorney in Reno represented the corporation, of course; a man named Barber invested some money, had something to do with the corporation, but Mr. Bobbroff apparently is the man that received the money from selling some stock, which I understand was promotion stock, which shouldn't have been sold at all. Of course, his co-defendant in the case, there has been no verdict rendered on that case and we have Mr. Bobbroff before the court for sentence. He denies the corporation funds were placed across the game tables. There has been a question, your Honor, about this man working upon the heartstrings of these different women, even in Reno. The defendant relates, because of his physical disability, which I have stated, he is not in fact an amorous person, in fact, stays away from his home at the present time because of [10] his physical disability. I believe the Court is certainly in a better position than I am to make the final decision just what the situation is. I have tried to present all that has come to me from questioning the defendant. The defendant has no prior criminal rec-

ord, your Honor. There is a record where he was arrested on three or four occasions in Portland on various charges. However, there was no disposition ever made of those charges and the FBI fingerprint indicates this is the first felony charge against him. He was never fingerprinted previously.

The Court: Does counsel for the defendant desire to make any statement?

Mr. Skinner: Yes, your Honor please. The indictment involved two elements, first the representations, and secondly, disposition of the money. For your Honor's consideration, I would like to point out that there was no evidence as to just the disposition of the money was. Mr. Barber, Mr. Zapf, as I think your Honor will recall, all testified to the fact that the expenses of the corporation were paid by Mr. Bobbroff, other than such items as were shown by disbursements from the two accounts that were in evidence. It also appears from the testimony of the government's witnesses that Mr. Bobbroff was a rather poor business man, but had surrounded himself with some talent for taking care of legal matters in connection with the corporation and also the office management. It is [11] also quite obvious from the evidence that that was not done. They kept no books, they kept no records, although Mr. Barber testified that he was an accountant. I would suggest the Court consider that, inasmuch as reviewing all the evidence, I could see where there was no evidence at all as to the disposition of this money as alleged in the indictment, that it was not

used for corporate purposes. I think Mr. Devine has quite fully covered the matter and rather impartially. One thing I would like to add. I do not know whether Mr. Devine looked at the V. A. records to any extent, but the defendant here draws a disability pension and the V. A. record shows that Mr. Bobbroff is 30 per cent psychoneurotic. I wasn't able to find just exactly what that means, 30 per cent psychoneurotic as distinguished from 50 per cent. However, the V. A. record does substantiate the fact that he is a very poor business man, not able to do very much, not able to read except with considerable difficulty. That is all I have.

The Court: You may stand up, Mr. Bobbroff. I have read the report and was attracted by the last statement of your counsel and while I am talking about your counsel, I want to again say what I said before the jury, Mr. Bobbroff—you couldn't have had a more able defense if you had paid attorneys a thousand dollars a day for the two weeks that we were here in court. Everything that possibily could be done by an attorney in the [12] defense of another individual was done for you.

Now referring to this last statement of Mr. Skinner, you may not be able to read English, I don't know, but that feature doesn't appear to me at all. I think you are a very well informed man and that is the basis on which I am going to act. In other words, I do not think any ignorance on your part contributes at all to the position you find yourself in here today. I am not going to say anything

to you or make any remarks that might leave a hard feeling or grief or anything of that kind in your mind, but you have reached the end of the trail. I note also that you have no criminal record on paper. That amounts to this, you have never yet been caught but you have reached the end of the trail, I think. You have cost a lot of people a lot of money, brought a lot of distress to a great many people. So it is the judgment of the Court that the defendant is guilty of the offense charged in the 5th count of the indictment, which I think you understand is a rather long charge, covers matters that are set forth in the first count. You were here in court, of course, every moment of the trial, you know very well what the 5th count contains. It refers particularly to your depositing in the mail matters forwarded and addressed to Mrs. Gertrude Olness. You are adjudged guilty of that offense and you are, for that offense, committed to the custody of the Attorney General for the period of five years and [13] fined in the sum of two thousand dollars. On the charge contained in the third count, you are adjudged guilty of that offense and you are committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. On the charge contained in the 4th count of the indictment, you are adjudged to be guilty by virtue of the verdict of the jury, and you are hereby committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. By virtue of the verdict of the jury, you are adjudged guilty

of the charge contained in the 8th count and for that charge in the count you are committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. The sentences imposed on Count 4 will be concurrent with that imposed on Count 5, so far as the imprisonment is concerned. The sentence imposed on Count 8 is concurrent with the sentence imposed on Count 5, insofar as the imprisonment is concerned. The total term of imprisonment is eight years. The total fine imposed is five thousand dollars. You are fined one thousand dollars on Count 3, you are fined two thousand dollars on Count 5; on Count 8 you are fined one thousand dollars; on Count 4 you are fined one thousand dollars. The sentence imposed on the third count is consecutive. So the defendant is remanded to the custody of the [14] marshal.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the foregoing-entitled matter and that the foregoing pages, numbered 1 to 11, including this page, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, October 24, 1951.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed October 26, 1951. [15]

EXHIBIT No. 2

United States Department of Justice
Federal Correctional Institution
Seagoville, Texas

November 19, 1957.

Mr. Charles W. Tessmer,
Attorney at Law,
1002 Fidelity Building,
1000 Main Street,
Dallas, Texas.

Re: Bobbroff, James D.,
Reg. No. 6467-ST.

Dear Mr. Tessmer:

With reference to your letter dated November 15th requesting the total amount of time served by the above-named man, please be advised that as of this date Bobbroff has served 4 years, 7 months and 23 days in Federal custody.

Although Bobbroff was sentenced on October 5, 1951, he had a total of 538 days inoperative time while on appeal.

We trust this is the information you desire, and if we may be of any further service, please call upon us.

Sincerely yours,

/s/ L. P. GOLLAHER,
Warden.

Certified as correct.

/s/ G. W. JAMES,
Record Clerk. [16]

EXHIBIT No. 3

United States District Court
District of Nevada

No. 12,153

UNITED STATES

vs.

JAMES D. BOBBROFF and WILLIAM C. CHADWELL.

MINUTES OF COURT, OCTOBER 5, 1951

This being the time heretofore fixed for imposition of sentence in this case and the same coming on regularly this day. The defendant, James D. Bobbroff, is present in custody of the marshal, and with his attorney, Louis V. Skinner, thereupon the Court pronounces judgment on Counts 3, 4, 5 and 8 of the Indictment as follows: "It Is Adjudged

that the defendant is guilty as charged in the Indictment and convicted. It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years and Two Thousand ($2,000) Dollars Fine, to be paid to the U. S. on Count 5; Three (3) Years and One Thousand ($1,000) Dollars Fine, to be paid to the U. S. on Count 3; Three (3) Years and One Thousand ($1,000) Dollars Fine, to be paid to the U. S. on Count 4; Three (3) Years and One Thousand ($1,000) Dollars Fine, to be paid to the U. S. on Count 8; It Is Further Ordered that the prison sentence imposed on Count 4 will run Concurrently with the prison sentence imposed on Count 5; and that the prison sentence imposed on Count 8 will run Concurrently with the prison sentence imposed on Count 5; and that the sentence imposed on Count 3 will run Consecutively with the sentence imposed on Count 5; the total prison sentence is 8 years and the total fine is $5,000.00. It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant. The Court recommends commitment to: A Federal Penitentiary. Roger T. Foley, Judge." Defendant is remanded to the custody of the Marshal.

Attest: A True and Correct Copy.

[Seal] OLIVER F. PRATT,
Clerk. [17]

District Court of the United States
for the District of Nevada

No. 12,153

UNITED STATES OF AMERICA

vs.

JAMES D. BOBBROFF.

JUDGMENT AND COMMITMENT

Criminal Indictment for Viol. of T. 15, U.S.C., S. 77q (a) (1), and T. 18, U.S.C., S. 1341.

On this 5th day of October, 1951, came the attorney for the government and the defendant appeared in person and by counsel, Louis V. Skinner, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of guilty of the offense of (copy of offenses attached) as charged in the Indictment, Counts 3, 4, 5, 8, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years and Two Thousand

($2,000) Dollars Fine, to be paid to the U. S. on Count 5; Three (3) Years and One Thousand ($1,000) Dollars Fine, to be paid to the U. S. on Count 3; Three (3) Years and One Thousand ($1,000) Dollars Fine, to be paid to the U. S. on Count 4; Three (3) Years and One Thousand ($1,000) Dollars Fine, to be paid to the U. S. on Count 8; It Is Further Ordered that the prison sentence imposed on Count 4 will run Concurrently with the prison sentence imposed on Count 5; and that the prison sentence imposed on Count 8 will run Concurrently with the prison sentence imposed on Count 5; and that the sentence imposed on Count 3 will run Consecutively with the sentence imposed on Count 5; the total prison sentence is 8 years and the total fine is $5,000.00.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to: A Federal Penitentiary.

/s/ ROGER T. FOLEY,
United States District Judge.

AMOS P. DICKEY,
Clerk;

By /s/ SIDNEY R. WHITMORE,
Deputy Clerk. [18]

Return

I have executed the within Judgment and Commitment as follows:

Defendant delivered on October 5, 1951, to Washoe County Jail, Reno Nevada.

Defendant noted appeal on October 8, 1951.

Defendant released on $5,000.00 Bond September 6, 1952.

Defendant elected, on October 15, 1951, not to commence service of the sentence.

Defendant's appeal determined on April 6, 1953.

Defendant delivered on April 20, 1953, to Warden, Federal Penitentiary, at Leavenworth, Kansas, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

LEONARD R. CARPENTER,
United States Marshal;

By /s/ FRANK SADECHI,
Deputy U. S. Marshal.

INDICTMENT

First Count: (Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C., S 77q(a)(1)).

The Grand Jury charges:

1. Since on or about July 1, 1948, and continuing until about the date of this Indictment, the

defendants, James D. Bobbroff and William C. Chadwell, sometimes hereinafter referred to as the defendants, devised and intended to devise a scheme and artifice to defraud a certain class of persons, hereinafter referred to as the persons to be defrauded, being generally that class of persons whom the defendants believed could be induced to purchase and invest and reinvest in certain securities, to wit: The capital stock, $5 par value, of Eversharp Launwhiz, Inc., and certain promissory notes of the defendant, James D. Bobbroff secured by shares of the capitol stock, $5 par value, of Eversharp Launwhiz, Inc., and certain other promissory notes of the defendant, James D. Bobbroff, secured by shares of the Class B common stock, $1 par value, of Eversharp Lawnmower Company, and said scheme and artifice to defraud was in substance as follows:

2. That the defendants would and they did cause Eversharp Launwhiz., Inc., to be incorporated under the laws of the State of Nevada with an authorized capital of $1,500,000, represented by 300,000 shares of $5 par value capital stock, to engage in the manufacture and marketing of lawnmowers and parts thereof.

3. That Eversharp Lawnmower Company was and is a corporation incorporated under the laws of the State of Nevada with an authorized capital of $300,000, represented by 15,000 shares of Class A common stock of a par value of $10 per share and 150,000 shares of Class B common stock of a par value of $1 per share, and that the defendant,

James D. Bobbroff, would and he did on or about August 17, 1948, enter into a certain agreement with Eversharp Lawnmower Company by the terms of which the defendant, James D. Bobbroff, received from Eversharp Lawnmower Company the exclusive right and license to manufacture and sell on a royalty basis lawnmowers and parts thereof as described in said agreement, and that the defendant, James D. Bobbroff, would and he did on or about February 4, 1949, assign his interest in said agreement to Eversharp Launwhiz, Inc., in consideration of the issuance to the defendant, James D. Bobbroff, of 135,000 shares of the capital stock, $5 par value, of Eversharp Launwhiz, Inc.

4. That the defendants, James D. Bobbroff and William C. Chadwell, would and they did, in order to deceive and mislead the persons to be defrauded, falsely and fraudulently represent and state to them that funds invested in the capital stock, $5 par value, of Eversharp Launwhiz, Inc., and the promissory notes issued by the defendant, James D. Bobbroff, would be used to manufacture Eversharp Lawnmowers or to meet necessary expenses of Eversharp Launwhiz, Inc., while negotiations were being consummated with reliable manufacturers to build Eversharp Lawnmowers on a royalty basis, when in truth and in fact, as the defendants well knew, but concealed from and omitted to state to the persons to be defrauded, the capital stock, $5 par value, of Eversharp Launwhiz, Inc., was being sold by and for the benefit of the defendants, James D. Bobbroff

and William C. Chadwell, and not by and for the benefit of Eversharp Launwhiz, Inc., and the defendants intended to and did, at least in part, appropriate to their own uses and purposes the funds received from the sale of such stock, together with the funds received from the sale of the promissory notes issued by the defendant, James D. Bobbroff.

5. That the defendants, James D. Bobbroff and William C. Chadwell, would and they did for the purpose and with the intent of misleading and deceiving the persons to be defrauded, and to induce them to purchase, invest and reinvest in the securities described in paragraph 1 hereof, make and cause to be made to them numerous false and fraudulent representations, promises and pretenses, in addition to those heretofore specified, said additional false and fraudulent representations, pretenses and promises being in substance as follows, to wit: [19]

(a) That Eversharp Launwhiz, Inc., had acquired the trade-mark name of "Eversharp Launwhiz," together with all patents and patents pending formerly the property of James D. Bobbroff, the inventor.

(b) That the main plant of Eversharp Launwhiz, Inc., was in Belmont, California, where Erie Manufacturing Company was producing 100-200 machines daily.

(c) That Motor-mower Co. of Detroit was geared to produce 500 to 1,000 lawnmowers

daily and would go into production in the near future.

and each and every one of said representations, pretenses and promises, as the defendants well knew, was false and fraudulent and intended by the defendant so to be, and was made in order to deceive and defraud the persons to be defrauded.

6. That on or about March 29, 1949, the defendants, James D. Bobbroff and William C. Chadwell, so having devised said scheme and artifice to defraud, did, at Winnemucca, Nevada, in the District of Nevada, and within the jurisdiction of this Court, in the sale of securities, to wit: Shares of the capital stock, $5 par value, of Eversharp Launwhiz, Inc., and certain promissory notes of the defendant, James D. Bobbroff, more fully described in paragraph 1 above, by the use of the United States mails, unlawfully, wilfully, knowingly and feloniously, employ said scheme and artifice to defraud, and said use of the United States mails was in the manner following, to wit:

The defendants, James D. Bobbroff and William C. Chadwell, on or about March 29, 1949, at Winnemucca, Nevada, in the District of Nevada, and within the jurisdiction of this Court, knowingly caused to be delivered by the United States mails, according to the direction thereon, a letter enclosed in a postpaid envelope, addressed to Mr. Rosio Echave, P. O. Box 533, Winnemucca, Nevada.

Third Count (Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C., S 77q(a)(1)):

The Grand Jury charges:

1. The Grand Jury realleges all of the allegations of the First Count of this Indictment except those contained in paragraph 6 thereof.

2. That on or about October 3, 1949, the defendant, James D. Bobbroff, so having devised said scheme and artifice to defraud, did, at Winnemucca, Nevada, in the District of Nevada, and within the jurisdiction of this Court, in the sale of securities, to wit: Shares of the capital stock, $5 par value, of Eversharp Launwhiz, Inc., and certain promissory notes of the defendant, James D. Bobbroff, more fully described in paragraph 1 of the First Count, by the use of the United States mails, unlawfully, wilfully, knowingly and feloniously, employ said scheme and artifice to defraud, and said use of the United States mails was in the manner following, to wit:

The defendant, James D. Bobbroff, on or about October 3, 1949, at Winnemucca, Nevada, in the District of Nevada, and within the jurisdiction of this Court, knowingly caused to be delivered by the United States mails, according to the direction thereon, a letter enclosed in a postpaid envelope, addressed to Mr. Rosio Echave, P. O. Box 533, Winnemucca, Nevada.

Fourth Count (Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C., S 77q(a)(1)):

The Grand Jury charges:

1. The Grand Jury realleges all of the allegations of the First Count of this Indictment except those contained in paragraph 6 thereof. [20]

2. That on or about October 3, 1949, the defendant, James D. Bobbroff, so having devised said scheme and artifice to defraud, did, at Winnemucca, Nevada, in the District of Nevada, and with the jurisdiction of this Court, in the sale of securities, to wit: Shares of the capital stock, $5 par value, of Eversharp Launwhiz, Inc., and certain promissory notes of the defendant, James D. Bobbroff, more fully described in paragraph 1 of the First Count, by the use of the United States mails, unlawfully, wilfully, knowingly and feloniously, employ said scheme and artifice to defraud, and said use of the United States mails was in the manner following, to wit:

The defendant, James D. Bobbroff, on or about October 3, 1949, at Winnemucca, Nevada, in the District of Nevada, and within the jurisdiction of this Court, knowingly caused to be delivered by the United States mails, according to the direction thereon, a letter enclosed in a postpaid envelope, addressed to Mr. George S. Haskins, c/o First National Bank, Winnemucca, Nevada.

Fifth Count (Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C., S 77q(a)(1)):

The Grand Jury charges:

1. The Grand Jury realleges all of the allegations of the First Count of this Indictment except those contained in paragraph 6 thereof.

2. That on or about October 3, 1949, the defendant, James D. Bobbroff, so having devised said scheme and artifice to defraud, did, at Reno, Nevada, in the District of Nevada, and within the jurisdiction of this Court, in the sale of securities, to wit: Shares of the capital stock, $5 par value, of Eversharp Launwhiz, Inc., and certain promissory notes of the defendant, James D. Bobbroff, more fully described in paragraph 1 of the First Count, by the use of the United States mails, unlawfully, wilfully, knowingly and feloniously, employ said scheme and artifice to defraud, and said use of the United States mails was in the manner following, to wit:

The defendant, James D. Bobbroff, on or about October 3, 1949, at Reno, Nevada, in the District of Nevada, and within the jurisdiction of this Court, knowingly caused to be placed in an authorized depository for mail matter a letter enclosed in a postpaid envelope, addressed to Mrs. Gertrude Olness, 2542 Durant Street, Berkeley, California, to be sent or delivered by the Post Office Establishment of the United States.

Eighth Count (Criminal Code, Section 215, 18 U.S.C., S 338 (now 18 U.S.C., S 1341)):

The Grand Jury charges:

1. The Grand Jury realleges all of the allegations of the first count of this Indictment except those contained in paragraph 6 thereof.

2. That on or about October 3, 1949, the defendant, James D. Bobbroff, at Winnemucca, Nevada, in the District of Nevada, and within the jurisdiction of this Court, for the purpose of executing said scheme and artifice and attempting to do so, knowingly caused to be delivered by the United States mails, according to the direction thereon, a letter enclosed in a postpaid envelope, addressed to Mr. Mateo C. Legarza, 322 Bridge Street, Winnemucca, Nevada. [21]

I, James D. Bobbroff, acknowledge that I was tried in Federal Court at Carson City, Nevada, on September 10-28, 1951, and was found guilty on a charge of violation of the Securities Act of 1933 and Mail Fraud, and was sentenced to Eight (8) years and fined $5,000.00 on October 5, 1951, and that an appeal was filed and noted in my behalf on October 8, 1951. I elect not to begin serving my sentence.

Dated at Reno, Nevada, this 15th day of October, 1951.

/s/ JAMES D. BOBBROFF,
Signature of Prisoner.

In Presence of:

/s/ FRED BENNETT,
Witness;

/s/ J. J. WOOD,
Witness. [22]

(Copy)

Department of Justice
Bureau of Prisons
Washington 25

March 6, 1953.

Air Mail

Mr. Leonard R. Carpenter,
United States Marshal,
Reno, Nevada.

Dear Sir:

The United States Penitentiary, Leavenworth, Kansas, is designated as the place of confinement for James D. Bobbroff, for classification and medical observation.

Sincerecly yours,

/s/ J. V. BENNETT,
JAMES V. BENNETT,
Director.

[Endorsed]: Filed April 27, 1953.

[Title of District Court and Cause.]

COPY OF DOCKET ENTRY
OF JANUARY 16, 1958

1-16-58—It Is Ordered, that this matter, be, and the same hereby is, taken advisement by the Court as to the Motion to Vacate Sentence.

Attest: A True and Correct Copy.

[Seal] /s/ OLIVER F. PRATT,
Clerk;

By /s/ J. P. FODRIN,
Deputy. [24]

United States District Court
for the District of Nevada

No. 1358

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES D. BOBBROFF,
Defendant.

OPINION, FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Defendant Bobbroff moves to vacate sentence under § 2255, Title 28, U.S.C.A.

Defendant was found guilty in the United States District Court for the District of Nevada of violation of Counts 3, 4, 5 and 8 of an indictment Counts 3, 4 and 5 charged the use of the mails in an offer to dispose of, to three shareholders in a Nevada corporation, Eversharp Launwhiz, Inc., further shares therein by employing a scheme to defraud in violation of the Securities Act of 1933, 15 U.S.C.A., § 77q(a)(1). Count 8 charged a similar use of the mails in an attempt to sell further shares to another shareholder of Eversharp Launwhiz, Inc., in violation of the mail fraud Statute, 18 U.S.C., § 1341. On February 25, 1953, the United States Court of Appeals, Ninth Circuit, affirmed the judgment, 202 F. 2d 389.

In Paragraph II of his motion the defendant contends:

> "That he has at this time [December 13, 1957] served completely all sentences against him, save and except the sentence imposed on Count 3 of the indictment * * *. That is to say, your petitioner has served sufficient time to complete the sentences on Counts 5, 4 and 8 of the indictment." [25]

In Paragraph III we find a statement of grounds of the motion:

> "(a) The order of sequence of serving the sentences is not provided for.
>
> "(b) The sentences imposed on two of the concurrent counts are for different period of

times, that is to say, five years and three years to be served concurrently and there is no provision that the sentence imposed on Count 3 is to cumulate with Count 5 or with the other counts which were for three years instead of five years, thereby rendering the said sentence uncertain.

"(c) There is no provision when the commencement of the sentence on Count 3 is to begin, that is to say, when the five-year sentence terminates or when the three-year sentence would terminate and for that reason the cumulation is ineffective.

"(d) The judgment expressly provides that Count 3 will run consecutive with Count 5 while the sentence contains no such provision."

Petitioner, by reference, has made three exhibits parts of his motion. It will be noted that in Paragraph III of the motion Exhibit No. 1 is erroneously referred to as "a properly certified copy of the official minutes of the above Court in the above-styled and numbered cause and the exact sentence as rendered in open Court." Exhibit No. 1 is the reporter's transcript of proceedings of October 5, 1951, while Exhibit No. 3 is a certified copy of the minutes of the Court of October 5, 1951. Exhibit No. 2, likewise made a part of the motion, is a statement of time served in Federal Correctional Institution.

From the reporter's transcript of proceedings of

October 5, 1951, Exhibit No. 1 herein, among other things, the following appears:

> "The Court [In addressing the defendant]: * * * So it is the judgment of the Court that the defendant is guilty of the offense charged in the 5th count of the indictment, * * *. You are adjudged guilty of that offense and you are, for that offense, committed to the custody of the Attorney General for the period of five years and fined in the sum of two thousand dollars. On the charge contained in the third count, you are adjudged guilty of that offense [26] and you are committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. On the charge contained in the 4th count of the indictment, you are adjudged to be guilty by virtue of the verdict of the jury, and you are hereby committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. By virtue of the verdict of the jury, you are adjudged guilty of the charge contained in the 8th count and for that charge in the count you are committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars.
>
> "The sentences imposed on Count 4 will be concurrent with that imposed on Count 5, so far as the imprisonment is concerned. The sentence imposed on Count 8 is concurrent with

> the sentence imposed on Count 5, insofar as the imprisonment is concerned. The total term of imprisonment is eight years. The total fine imposed is five thousand dollars. You are fined one thousand dollars on Count 3, you are fined two thousand dollars on Count 5; on Count 8 you are fined one thousand dollars; on Count 4 you are fined one thousand dollars. The sentence imposed on the third count is consecutive."

In Exhibit No. 3 herein, minutes of Court, among other things, we find the following:

> "* * * It Is Further Ordered that the prison sentence imposed on Count 4 will run Concurrently with the prison sentence imposed on Count 5; and that the prison sentence imposed on Count 8 will run Concurrently with the prison sentence imposed on Count 5; and that the sentence imposed on Count 3 will run Consecutively with the sentence imposed on Count 5; the total prison sentence is 8 years and the total fine is $5,000.00. * * *"

It is to be noted that the minutes expressly state: "That the sentence imposed on Count 3 will run consecutively with the sentence imposed on Count 5; the total prison sentence is 8 years and the total fine is $5,000.00," and that the reporter's transcript, Exhibit No. 1, as above shown, states "the sentence imposed on the third count is consecutive. * * *" The minutes of the Court obviously were made up

from the Clerk's notes made at the time of rendition of sentence and the reporter's transcript is made up of shorthand notes made at the time of the rendition of the sentence. No good reason appears to the Court why greater credence should be given to the reporter's shorthand [27] notes and her transcript than that which should be given to the Clerk's notes and to the "minutes" based upon them. However, regardless of which should control, the duration of the terms of imprisonment are made clear by the language of the reporter's transcript. If it is to be assumed that the language of the transcript is correct, the most that can be said in support of defendant's contention is that while more precise language might have been used, the duration of the terms of imprisonment are made clear by the language of the reporter's transcript. It is apparent therefrom that the language of the transcript itself provided that after the defendant had served the five-year term imposed under Count 5 of the indictment, the terms imposed upon each of Counts 4 and 8 would have been completed, the imprisonment terms on Counts 4 and 8 having been expressly made concurrent with the sentence imposed on Count 5, leaving remaining to be served a consecutive sentence imposed on Count 3. It was made plain to the defendant that the total term of imprisonment was to be eight years. After completion of the sentences imposed on Counts 5, 4 and 8, but five years would have been served. Therefore, it must have been apparent to him that the sentence on Count 3, which was a consecutive sentence, was to be served after the completion of the

five-year term imposed on Count 5. No other construction would be consistent with the announced intention of the Court to make the total period of imprisonment eight years.

In United States v. Daugherty, 269 U.S. 360 on 363, Mr. Justice McReynolds, speaking for the Court, stated:

> "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded. Tested by this standard the judgment here questioned was sufficient to impose total imprisonment for fifteen years made up of three five-year terms, one under the first count, one under the second and one under the third, to be [28] served consecutively and to follow each other in the same sequence as the counts appeared in the indictment. This is the reasonable and natural implication from the whole entry. The words, 'said term of imprisonment to run consecutively and not concurrently,' are not consistent with a five-year sentence."

Findings of Fact

Therefore, the Court finds:

1. That the sentence imposed upon the defendant was, in substance, as follows: Five years' imprisonment and $2,000 fine on Count 5; three years' im-

prisonment and $1,000 fine on Count 3; three years' imprisonment and $1,000 fine on Count 4; three years' imprisonment and $1,000 fine on Count 8; that the prison sentence imposed on Count 4 to run concurrently with the prison sentence imposed on Count 5; that the prison sentence imposed on Count 8 to run concurrently with the prison sentence imposed on Count 5; that the prison sentence imposed on Count 3 will run consecutively with the sentence imposed on Count 5, and that the total prison sentence is eight years and the total fine is $5,000.

2. That the judgment and sentence was within the jurisdiction of the Court and was authorized by law.

Conclusions of Law

The Court concludes:

1. That defendant's motion should be, and it hereby is, denied.

Let Judgment Be Entered Accordingly.

Dated: This 28th day of January, 1958.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed January 28, 1958. [29]

[Title of District Court and Cause.]

COPY OF DOCKET ENTRY OF JANUARY 30, 1958

1-30-58—Ordered that defendant Brobbroff's Motion to Vacate Sentence Under Sec. 2255, T. 18, U.S.C., be, and the same hereby is, denied.

1-30-58—Rittenhouse, Babcock and Tessmer advised of the entry of above order and judgment.

Attest: A True and Correct Copy.

[Seal] /s/ OLIVER F. PRATT,
Clerk;

By /s/ J. P. FODRIN,
Deputy. [30]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Defendant (Petitioner) James D. Bobbroff, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from an order filed on January 28, 1958, overruling his Motion to Vacate Sentence under Title 28, Section 2255, U.S.C., and from the Judgment entered thereon on January 30, 1958, in the Minutes of the United States District Court for the District of Nevada, denying the Defendant's (Peti-

tioner's) motion to vacate sentence under Title 28, Section 2255, U.S.C.

/s/ JAMES D. BOBBROFF,
Pro Se;

By /s/ CHARLES WILLIAM TESSMER,
Attorney for Defendant
(Petitioner).

Certificate

I, Charles William Tessmer, hereby certify that on this, the 5th day of February, 1958, a copy of this Notice of Appeal was served upon the United States District Attorney for the District of Nevada, by mailing to his office at P. O. Box 1889, Las Vegas, Nevada, postage prepaid, a copy thereof.

/s/ CHARLES W. TESSMER,
Attorney for Defendant
(Petitioner).

[Endorsed]: Filed February 10, 1958. [31]

[Title of District Court and Cause.]

No. 1358

BOND FOR COSTS

Know all men that we, James D. Bobbroff, as principal, and Charles W. Tessmer, as surety, do hereby acknowledge ourselves bound jointly and severally to pay to United States of America and the officers of said court the full sum of the costs

that have accrued and may accrue in the above-entitled and numbered cause, conditioned that James D. Bobbroff, plaintiff in the above-entitled suit, will pay all costs that may be adjudged against him in said suit during the pendency or at the final determination thereof; and judgment for the said costs may be rendered against us, to be entered in the final judgment in the cause; and also for any cost incurred in the Court of Appeals for the 9th Circuit in this cause and that I, James D. Bobbroff, have heretofore given security in the amount of $250.00 to the Clerk of the above Court.

Witness our hands this 11th day of Feb., 1958.

/s/ JAMES D. BOBBROFF,

/s/ CHARLES W. TESSMER.

Sworn to and subscribed before me by the said James D. Bobbroff this 11th day of Feb., 1958, to certify which witness my hand and seal of office.

/s/ A. L. LINDGREN,

Authorized by the Act of July 7, 1955, to Administer Oaths (18 U.S.C. 4004).

Sworn to and subscribed before me by the said Charles W. Tessmer this 12th day of Feb., 1958, to certify which witness my hand and seal of office.

[Seal] /s/ LASSIE JO SELF,
Notary Public in and for Dallas County, Texas.

[Endorsed]: Filed February 17, 1958. [32]

[Title of District Court and Cause.]

No. 1358

CERTIFICATE OF CLERK, U. S. DISTRICT COURT

United States of America,
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents, listed in the attached index, are the originals filed in this court, or true and correct copies of docket entries and court minutes of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 5th day of March, 1958.

[Seal] /s/ OLIVER F. PRATT,
Clerk, U. S. District
Court. [35]

[Endorsed]: No. 15928. United States Court of Appeals for the Ninth Circuit. James D. Bobbroff, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed March 7, 1958.

Docketed March 13, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15928

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES D. BOBBROFF,

Defendant.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY IN THIS APPEAL

Now comes the defendant-appellant in the above-numbered and entitled cause and respectfully would show the Honorable Court that he intends to rely in this appeal upon the following points:

1. That the Judgment and Sentence in the original Cause No. 12153, Criminal, in the District Court of the United States for the District of Nevada, will not support a cumulation of the sentences attempted to be imposed against defendant-appellant, because the sentences attempted to be imposed were vague, uncertain and indefinite and did not provide for the proper sequence of serving and expressly provided in the judgment that said sentences were to run consecutive with one another.

2. That the Judgment and Commitment do not conform to the actual sentence of the District Court, which consists of the reporter's transcript of the proceedings of October 5, 1951, same being the

actual judgment in the case and the Judgment and Commitment as reflected by the minutes of the Clerk, dated October 5, 1951, which was the ministerial judgment entered upon the sentence previously imposed.

3. That the District Court erred in overruling defendant-appellant's motion to vacate sentence for the reason that the attempted cumulation of Count 3 with the other Counts in the original indictment against appellant is ineffective and is not supported by the documentary evidence adduced at the hearing before the trial court.

/s/ JAMES D. BOBBROFF,
Pro Se;

By /s/ CHARLES W. TESSMER,
Attorney for Defendant-Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 13, 1958.